In the matter of arbitration between
International Brotherhood of Teamsters,
Local No. 120 [Robbie Hall] and
SUPERVALU, Inc.

OPINION AND AWARD

BMS Case No. 07-RA-0129

GRIEVANCE ARBITRATION

ARBITRATOR

Joseph L. Daly

APPEARANCES

On behalf of Teamsters Local No. 120
Martin J. Costello, Esq.
Hughes & Costello
St. Paul, Minnesota

On behalf of SUPERVALU
Jonathan O. Levine
Michael Best
Milwaukee, Wisconsin

JURISDICTION

In accordance with the Agreement between SUPERVALU, Inc. and Teamsters Local No. 120, June 1, 2005 - May 31, 2010; and under the jurisdiction of the State of Minnesota, Bureau of Mediation Services, the above Grievance Arbitration was submitted to Joseph L. Daly, arbitrator, on April 25, 2007. Post-Hearing Briefs were filed by the parties on June 15, 2007. The decision was rendered by the arbitrator on July 20, 2007.

ISSUE AT IMPASSE

The parties stipulate that the issue is:

Whether SUPERVALU, Inc. had just cause to terminate Mr. Robbie Hall; if not, what is the appropriate remedy? [Post-Hearing Brief of SUPERVALU at 1; Post-Hearing Brief of Teamsters at 6].

The relevant contractual provisions include:

ARTICLE 13
DISCHARGE

13.01 Drunkenness, dishonesty, insubordination, or repeated negligence in the performance of duty; unauthorized use of or tampering with Employer's equipment; unauthorized carrying of passengers; violations of Employer's rules which are not in conflict with this Agreement; falsification of any records; or violation of the terms of this Agreement shall be grounds for immediate discharge.

13.02 Discipline based on computer performance: The Employer agrees to thoroughly investigate prior to issuing discipline based on computer information. The investigation will, at a minimum, include a discussion with the employee.

13.03 Employees desiring to protest discharge must do so within five (5) calendar days by giving notice in writing to the Employer and the Union.

13.03 All grievances, other than "discharge", must be raised within ten (10) days of the alleged occurrence, or they will be deemed to be waived.

13.04 Warning notices will be disregarded after an eleven (11) month period for disciplinary purposes.

The relevant company Attendance Policy is:

Attendance Guidelines
SUPERVALU Minneapolis Distribution Center

PURPOSE

Regular attendance and punctuality are essential functions of every job at SUPERVALU. Absenteeism and tardiness reduce the efficiency of our business operations, cost SUPERVALU and its customers money, and force others to do the work of absent or tardy colleagues. SUPERVALU INC. has created this guideline to:

(a) Encourage employees to work their scheduled work days, including overtime;
(b) Ensure that employees who do not perform these essential functions understand the consequences of their actions.
(c) Provide a means for progressive discipline and termination of employees who fail to meet the Company's attendance and punctuality expectations.

The Attendance Guidelines take into account that unforeseen events and illnesses happen to everyone, and provide ample accommodation for such events. Employees only receive discipline after their attendance is deemed unacceptable, and employees will receive several notices before termination occurs. However, the Attendance Guidelines are "no fault," meaning that if

the absence is not "excused" under the definition below, the reason for the absence is irrelevant. It is essential, therefore, that employees use and track all absences carefully, so when an unforeseen event does occur, it will not jeopardize their job.

UNEXCUSED ABSENCE

An absence includes all or part of a scheduled workday (regular or over-time), including:

1. Absence for a full day,
2. Absence from a scheduled shift,
3. Early departure from a scheduled workday or shift,
4. Tardiness of sixty (60) minutes or more for a scheduled workday or shift.
5. Every two (2) tardies of less than sixty (60) minutes will count as a full days absence.

All absences are unexcused unless they fall under one of the following exceptions:

1. Paid holidays, unless the employee is scheduled to work.
2. Funeral leave, if authorized by the Company.
3. Subpoena for jury duty/court required appearance, with appropriate advance notice.
4. Leave of absence, approved in writing, pursuant to Collective Bargaining Agreement and all other Company approved leaves.
5. Company-approved FMLA leave pursuant to the Company's FMLA policy.
6. State/Federal Government approved absences.
7. Workers' compensation-related approved absences.
8. Disciplinary suspensions.
9. Military duty.
10. Bona fide union business with prior notice that is approved by the Company.
11. Paid scheduled vacation.
12. Time off for lack of work, approved in advance by the Company.

PROGRESSIVE DISCIPLINARY ACTION

Unless covered by the accelerated disciplinary provision described below, unexcused absences will be dealt with as follows:

DISCIPLINE STEPS

1.	Consultation	Upon three (3) absences (Includes FMLA, DOR documentations/discussion)

2.	Verbal Warning	Upon five (5) or more absences
3.	1st Written Warning	Upon seven (7) or more absences
4.	Final Written Warning	Upon nine (9) or more absences
5.	Termination	Upon eleven (11) or more absences

Absences before or after holidays, vacations, split vacation days, personal days or weekends (two regularly scheduled consecutive days off) are especially problematic and burdensome to the Company and fellow employees and therefore will be treated more aggressively. The first time such an absence occurs, no accelerated discipline will apply. However, each time thereafter, the employee will receive the next level of progressive discipline than their absences would otherwise qualify them for (see appendix for examples).

Discipline remains active in the employee's file for eleven (11) months. Progressive discipline is applied using a rolling eleven (11) month period.

NOTIFICATION REQUIREMENT

Employees (warehouse and sanitation) must notify the Company approved call-in service at least one (1) hour before their scheduled start time whenever:

(a) The employee will not be reporting to work; or
(b) The employee will be late.

The employee must communicate to their supervisor in the event they must leave work early.

The employee's responsibilities for reporting absences are:

* Call AAB Communications @ 1-800-395-6053 at least one (1) hour prior to your shift start.
* When your call is answered, please provide the following:

1. SUPERVALU
2. Full name
3. LMS number
4. Must give a reason for absence
5. AAB Communications will not take requests for paid time off

* The Call-In Line is staffed 24 hours a day/seven (7) days a week

Employees **must** use the Call-in service to report all absences (except for paid time off for vacation days and personal holidays). No other method of calling in will be accepted.

Employees who fail to follow these notification requirements may be disciplined under Company Rules and Regulations.

NO CALL NO SHOW

As described in Article 26 of the Collective Bargaining Agreement "REPORTING FOR WORK: If any employee is notified to report for work and does not report promptly or give satisfactory explanation for not reporting, the employee shall be considered as having **voluntarily quit**".

DISCIPLINE VIA MAIL

To comply with contractual time limits, the Company reserves the right to mail disciplinary and other important notices to the employee's home address. Employees are responsible for keeping the Company informed of all address changes; the employee's failure to do so, and subsequent failure to receive important notices, will not invalidate the discipline issued and mailed. The Union will receive a copy of all mailed discipline. Discipline will be mailed in a regular envelope, first class mail, postage pre-paid. **Final Warning and Termination letters will be sent via regular and certified mail.**

GUIDELINE REVISION

SUPERVALU reserves the right to change or revise this Guideline or any of its other policies and procedures regarding employment whenever the Company determines, at its sole discretion, that such action is warranted. The Union will be notified in advance of any such change.

This Policy supersedes all previously published Policies or Guidelines regarding attendance and takes effect as of June 12, 2005.

Bruce Anderson	Roger Ohlhauser	Steve Hobbs
General Manager	Distribution Director	HR Director
SUPERVALU	SUPERVALU	SUPERVALU

[Joint Exhibit No. 2, emphasis in original]

FINDINGS OF FACT

1. On June 9, 2006, Mr. Robbie Hall, a full-time warehouse employee since March 1, 1997, was terminated for excessive absences. Mr. Hall filed a grievance on June 14, 2006 "claiming immediate reinstatement with any and all lost wages, benefits and seniority". [See Joint Exhibit No. 16 and 17 respectively].

2. Mr. Hall has a lengthy record of ungrieved discipline prior to June 2005, including the following:

Date	Type of Discipline
4/9/98	Verbal Warning
9/16/98	Verbal Warning
7/13/00	Verbal Warning
11/4/00	Verbal Warning
2/18/01	Written/Suspension
5/27/01	Suspension
12/16/01	Verbal Warning
12/19/01	Written Warning
8/20/02	Verbal Warning
8/21/03	Verbal Warning
9/2/03	Written Warning
12/29/03	Written Warning
12/5/04	Verbal Warning
1/6/05	Verbal Warning
2/21/05	Written Warning

Many of Mr. Hall's absences involved no-call/no-shows. [Post-Hearing Brief of Company at 2, citing Company Exhibit 2, pages 17-20].

Mr. Hall was also disciplined for punching in at a different building, rather than at his actual work site "in order to hide and avoid discipline for his tardiness". [Post-Hearing Brief of Company at 2]. Mr. Hall was disciplined on the following occasions for this behavior:

Date	Type of Discipline
1/25/05	Verbal Warning
3/3/05	Written Warning
3/27/05	Suspension
11/4/05	Suspension

3. On June 12, 2005, the Company posted on the bulletin board and mailed to each employee a revised Attendance Policy. [Joint Exhibit No. 2].

On August 17, 2005, the Company held crew meetings and posted a Weekly Bulletin informing employees about the customer service problems that "excessive absenteeism" was causing. On August 30, 2005, the Company issued an "Urgent Bulletin" when weekend absenteeism reached "critical

levels". The Bulletin pointed out that recent absenteeism had "caused significant disruption in service" and "considerable inconvenience and expense" to customers. [Company Exhibit No. 1]. The Bulletin also pointed out that loss of sales caused by customers changing suppliers could result in job losses.

4. On October 12, 2005, the Union and the Company held a Step 4 Grievance Hearing to deal with grievances filed by four employees--Mr. Hall was not one of them-- who had recently been terminated under the Attendance Policy. In an effort to resolve a backlog of attendance grievances, a panel decided that the grievants would have their terminations converted to unpaid suspensions and be placed at the final written warning Step under the Attendance Policy. [Post-Hearing Brief of Company at 5].

5. On October 27, 2005, Mr. Hall was given a "final warning". During a meeting with the Union steward and supervisor, Mr. Hall claimed that all of his absences since September 21, 2005 should have been excused under the Company's FMLA policy. However, Mr. Hall's FMLA requests had previously been denied because he failed to provide the Company with the required medical certification supporting his claim. Mr. Hall did not grieve the denial of his FMLA request nor the final warning.

From November 5-30, 2005, Mr. Hall was suspended for again "attempting to conceal his tardiness by punching in at a different building". [Post-Hearing Brief of Company at 6 citing Company Exhibit 3]. "But for an oversight by the Company [Mr. Hall] would have been discharged on December 13, 2005 when he accumulated his 11th unexcused absence". [Post-Hearing Brief of Company at 6, citing Joint Exhibit 9].

6. From December 21-28, 2005, Mr. Hall was absent from work. On December 28, 2005, the Company received a fax from Park Nicollet Clinic indicating that Mr. Hall could return to work without any restrictions. Since the facts did not indicate why Mr. Hall was absent or what dates the doctor was requesting Mr. Hall be excused for, Mr. Hall was told that his absences put him well over the limit under the Attendance Policy. He was given an FMLA Medical Certification form for his doctor to

complete. Consistent with FMLA policy and federal law, Mr. Hall was given 15 days to return a completed medical certification form showing that his prior absences qualified for protection. Mr. Hall failed to return the completed form in a timely fashion and a letter denying his request for FMLA was issued on January 13, 2006.

On January 16, 2006, Mr. Hall submitted a Medical Certification form which indicated that he had arthritis in his left knee. The certification also indicated that Mr. Hall was not currently incapacitated, did not identify any dates in which he was incapacitated from working due to arthritis, and was incomplete with regard to the requested prognosis information. As a result, Mr. Hall's employment was terminated on February 9, 2006 because the denial of his FMLA request had resulted in the accumulation of 20 unexcused absences. A grievance was filed and the parties agreed to settle the grievance by reinstating Mr. Hall with 9 points and a "final warning". [Post-Hearing Brief of Company at 7, citing Joint Exhibit No. 10]. Mr. Hall was also required, as part of the settlement, to get the FMLA certification form he had turned in on January 16, 2005 completed properly. Ms. Sue Hanson, a Human Resource Specialist, highlighted the areas on the certification that Mr. Hall's doctor needed to address. Mr. Hall submitted the amended Medical Certification form from his doctor, Dr. Lebow. The amended Medical Certification form from Dr. Lebow stated that:

a. Mr. Hall was not currently incapacitated;

b. Mr. Hall could work but may need to work less than a full schedule/shortened hours during flare-ups;

c. The frequency and duration of future episodes is unknown and further diagnostics testing such as an MRI may allow better diagnosis; and

d. Mr. Hall should not squat or engage in heavy lifting during flare-ups [Joint Exhibit No. 11].

7. Broadspire Services, Inc., the third party FMLA administrator for SUPERVALU, Inc., exercised its legal right to request recertification of Mr. Hall's "serious health condition" and need for

FMLA leave. Broadspire sent Mr. Hall a letter dated April 20, 2006 requesting that his health care provider complete a new FMLA certification form which was attached to the letter. [Joint Exhibit No. 12]. The letter gave Mr. Hall until May 5, 2006 to return the completed form and inform Mr. Hall that failure to submit the form by the date specified would result in the denial of his "claim" for leave.

On April 27, 2006, Broadspire mailed Mr. Hall a reminder that the recertification form was due on May 5, 2006 and that failure to return that could result in a denial of his request for FMLA leave. On May 3, 2006, Karen, from Dr. Lebow's office, contacted Ms. Murray at Broadspire, and said that Dr. Lebow would not complete the Medical Certification form unless and until Mr. Hall was examined. Ms. Murray left a voicemail at Mr. Hall's home telling him he needed to make an appointment to see Dr. Lebow before Dr. Lebow would complete the medical certification form. [Post-Hearing Brief of Company at 10].

On May 17, 2006, Karen from Dr. Lebow's office left a voicemail at Broadspire indicating that Mr. Hall had not scheduled an office visit and that Dr. Lebow would not complete the Medical Recertification form until that happened. [Joint Exhibit No. 14, Page 9]. On May 18, 2006, Barry Johnston from Broadspire called Karen at Dr. Lebow's office and told her that Broadspire would again contact Mr. Hall and tell him he needed to call Dr. Lebow's office to schedule an appointment. On May 18, 2006, Mr. Johnston was able to speak with Mr. Hall directly. Mr. Johnston told Mr. Hall that Mr. Hall needed to call Dr. Lebow's office right away, schedule an appointment and then call Broadspire back with the FMLA information by May 22, 2006, the new determination date Broadspire was providing Mr. Hall. On May 22, 2006, Mr. Hall did see Dr. Lebow. But Mr. Hall did not contact Broadspire on May 22, 2006 and did not obtain or submit a completed recertification form. As a result, on June 1, 2006, Broadspire notified SUPERVALU, Inc. and Mr. Hall's absences since April 10, 2006 would not be covered by the FMLA. In other words, Mr. Hall's absences since April 10, 2006 did not qualify for protection under the FMLA and therefore the absences were not excused under the

Company's Attendance Policy. On June 9, 2006, Mr. Hall's employment was terminated "because he accumulated more than 27 unexcused absences in a rolling eleven (11) month period.

8. Mr. Hall scheduled the appointment with Dr. Lebow on May 22, 2006 because it was the next available date he could get an appointment to see Dr. Lebow. On May 22, 2006, Dr. Lebow told Mr. Hall he needed to undergo an MRI test before the doctor could fill out the FMLA certification form. [Post-Hearing Brief of Union at 3]. Mr. Hall contends that he informed Broadspire of Dr. Lebow's decision and the scheduled MRI, the first date available being June 16, 2006.

9. The basic contentions of the Union are:

   a. The Employer did not have just cause to terminate Mr. Hall;

   b. The Attendance Policy is not a substitute for just cause;

   c. SUPERVALU did not apply its Attendance Policy reasonably as to Mr. Hall;

   d. SUPERVALU improperly terminated Mr. Hall for FMLA covered absences;

   e. Mr. Hall qualified for FMLA leave;

   f. SUPERVALU improperly failed to provide FMLA leave for Mr. Hall's April and May 2006 occurrences;

   g. Just cause was lacking because SUPERVALU did not do a proper investigation;

   h. The severe penalty of discharge was not justified.

10. The basic contentions of the Employer are:

   a. SUPERVALU maintains and enforces its FMLA policy in accordance with federal law;

   b. Mr. Hall was aware of and understood the Family Medical Leave policy;

   c. The burden of proving a violation of the FMLA is on Mr. Hall;

   d. SUPERVALU exercised its legal right to seek recertification;

   e. Mr. Hall's failure to provide the requested recertification form was not excusable under the FMLA;

f. Mr. Hall's FMLA request was denied and his employment properly terminated because of his failure to comply with the Company's request for recertification;

g. The Company had a right to treat all absences since April 10 as an unexcused under its Attendance Policy;

h. Mr. Hall did not have a serious health condition within the meaning of the FMLA. The medical records do not establish that Mr. Hall was incapacitated from working during April 10-June 1, 2006; nor did the medical records establish that Mr. Hall was under continuing treatment;

i. Mr. Hall was discharged for just cause.

DECISION AND RATIONALE

The Employer has adopted a reasonable Attendance Policy which it attempts to administer fairly. Absenteeism rates in the warehouse had reached critical levels in August 2005. The Company had experienced significant disruption in service and considerable inconvenience and expense to its customers due to absenteeism. Further, the Company was concerned about loss of sales caused by the possibility of customers changing suppliers. Such loss of sales could result in job losses to members of the Union. So it instituted the new Attendance Policy. Nevertheless, the Attendance Policy, adopted unilaterally by the Employer, cannot supplant the Collective Bargaining Agreement. The parties agree that the standard for termination in the Collective Bargaining Agreement is a "just cause" standard. Both parties frame the issue: "Whether SUPERVALU had just cause to terminate Mr. Hall". Previous Arbitrators have consistently interpreted this Collective Bargaining Agreement to require "just cause" for termination.

"[T]he Attendance Policy is reasonable on its face and the Union did not attack it as unreasonable" said Arbitrator Steven A. Bard in another SUPERVALU case not involving this employee. [See Arbitrator Steven A. Bard, BMS Case No. 06-RA-1240 at 24, May 21, 2007]. "An Employer has just cause to discharge an employee whose conduct—either misconduct or failure of work

performance—has a significant adverse effect upon the enterprise of the Employer, if the Employer cannot change the conduct complained of by a reasonable effort to train or correct with lesser discipline". [See Arbitrator Gallagher, BMS Case No. 06-RA-107 at 22, February 28, 2007].

Since the Attendance Policy is not a substitute for "just cause", the question then is whether Mr. Hall's failure to obtain the necessary recertification within a reasonable time as required by the FMLA and the Attendance Policy is "just cause" for termination? The Union does not dispute that Mr. Hall was absent as alleged. Nor does the Union dispute that Mr. Hall received all steps of progressive discipline required under the Attendance Policy. The Attendance Policy is reasonable. The Company is correct in both its interpretation and its application of the FMLA in this case. Mr. Hall was given a break in early 2006 when the Company agreed to reinstate his employment even after he had received a final warning.

Mr. Hall was aware of and understood the Family Medical Leave policy. The FMLA policy is posted at the distribution center, widely known and frequently used by the employees of the Company. On a day-to-day basis, approximately 25% of the Company's Bargaining Unit employees are either using or seeking FMLA. The burden of proving a violation of the FMLA is on Mr. Hall. Courts and arbitrators have uniformly held that an employee has the burden of proving an alleged violation of his or her rights under the FMLA. "Such a claim constitutes an affirmative defense by which grievants seek to excuse his admitted absenteeism. In accord with time-honored arbitral precedent, the burden of proving such an affirmative defense rests upon grievant. Stated another way, it is not the employer's burden to disprove the affirmative defense of grievant. The burden rests on grievant and/or the Union". [See *Itegram-St. Louis Heating*, 113 La. 693, 698 (Marino, 1999)].

Mr. Hall had the burden of proving he complied with and was eligible for leave under the FMLA. The Company had a right to seek recertification and under the law, Mr. Hall needed to submit the completed recertification form within 15 days. Broadspire twice extended the deadline for Mr. Hall to return the completed recertification form. Mr. Hall did not return any paperwork to the Company

until the arbitration hearing - almost a year after his termination. While there may be certain circumstances in which an Employer must provide the employee more than 15 days to return a completed recertification form, that time is not without limits or constraints. An employee must exercise diligent, good faith efforts and submit the completed certification form as soon as reasonably possible under the particular facts and circumstances.

Mr. Hall admitted in his testimony at the arbitration hearing that he knew he had to return a completed medical certification form to the Company within 15 days; that he knew he had to move reasonably quickly to get an appointment and get seen by the doctor and get certified in a timely manner; and that he knew he should see Ms. Hanson, Human Rights Specialist, if he needed assistance in figuring out what to do on the FMLA policy. [Post-Hearing Brief of Company at 18, citing Tr. 132-133]. Mr. Hall failed to provide the required recertification form despite two extensions of time.

On the other hand, Mr. Hall did, in fact, suffer from a severe medical condition, i.e., a knee injury which caused recurring swelling, inflammation and pain. Mr. Hall could not control his physician's requirement for an MRI examination. Eventually he did obtain a doctor's report showing this, "illness, injury, impairment" that involves a "period of incapacity". [See FMLA 29 C.F.R. § 825.114(a)(2)(i)]. Eventually Mr. Hall did obtain a medical report showing he has a serious health condition which requires "a regime of continuing treatment under the supervision of [his] healthcare provider". [See FMLA 29 C.F.R. § 825.114(a)(2)(i)(B)]. But Mr. Hall did not carry his burden of proving this and the Employer properly concluded that without the recertification forms, Mr. Hall was excessively absent, especially based on his past history.

However, the severe penalty of discharge was not justified taking into account the reality of the medical condition. The medical condition qualifies for FMLA leave. But Mr. Hall did commit disciplinable misconduct by not taking into account the need to move with reasonable speed to fulfill his burden of proof under FMLA. His past record of discipline and attendance problems made it reasonable to move with all deliberate speed to get his medical condition certified so he would qualify for FMLA

leave. He did not act in a reasonable and timely manner under the facts of this situation. But at the same time, he eventually did show that he had an FMLA qualified injury.

Under these circumstances, "just case" dictates that the penalty be modified. The termination is converted to a long-term suspension without pay or benefits. Mr. Hall may return to his job on August 1, 2007 with the same seniority.

Mr. Hall must follow the Attendance Policy and must fulfill all the requirements laid out in FMLA law. The burden is on him to justify in a timely manner his absences under FMLA. Mr. Hall did violate SUPERVALU's Attendance Policy by not providing the necessary recertification forms in a timely manner. But because he had an FMLA excused condition in his knee, the termination is converted to a long-term suspension. The requirement continues to be on Mr. Hall to get the proper FMLA recertification forms to the Employer in a timely manner. He continues to risk termination if he violates the Attendance Policy.

Dated: July 20, 2007.

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Joseph L. Daly
Arbitrator